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NO. 85-1972

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EDWARD RONWIN,

Petitioner,

vs.

HON. WILLIAM A. HOLOHAN; HON. JACK D.H. HAYS; HON. JAMES DUKE CAMERON; and HON. STANLEY G. FELDMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Philip E. von Ammon
(Counsel of Record)
FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS
A Professional Corporation
100 West Washington Street, Suite 1700
Phoenix, Arizona 85003
Counsel for Respondents

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100 West Washington Street, Suite 1700
Phoenix, Arizona 85003
Counsel for Respondents

QUESTION PRESENTED FOR REVIEW

DOES ARIZONA SUPREME COURT RULE 28(c)XII COMPLY WITH THE REQUIREMENTS OF DUE PROCESS ON ITS FACE AND AS APPLIED BY RESPONDENT COURT?

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The Opinions of the United States Court of Appeals, Ronwin v. Holohan, No. 84-2201 (9th Cir. Jan. 8, 1986), and the United States District Court, No. CIV 84-102 PHX CAM (D. Ariz. 1984) are set forth in the Appendix to the Petitioner's Brief.

STATEMENT OF JURISDICTION

Respondents do not question the jurisdiction of this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in an appropriate case under 28 U.S.C. § 1254.

Petitioner, however, has not complied with Rules 17 and 21(j), Rules of the United States Supreme Court, as he has failed to specify a special or important reason for this Court to grant review on a Writ of Certiorari. The decision by the lower court is consistent with the decisions on similar matters by this

Court, the other federal courts of appeals, and the Arizona Supreme Court.

STATUTES AND RULES INVOLVED

Rule 28(a) and the applicable portions of Rule 28(c), Rules of the Arizona Supreme Court, are set forth in the Appendix at A-1.

STATEMENT OF THE CASE

On June 6, 1983, Petitioner filed with the Arizona Supreme Court his tenth application for admission to the State Bar of Arizona.[1] As part of that proceeding, Petitioner filed a document entitled "Request," demanding that the court provide him a written statement "of all charges and/or reasons that this Court has, or believes itself to have, for refusing to admit RONWIN to the State Bar

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[1] A partial history of Petitioner's unsuccessful attempts to be admitted to the State Bar of Arizona appears in Matter of Ronwin, 136 Ariz. 566, 667 P.2d 1281 (1983).

of Arizona." In his "Request," Petitioner also demanded an evidentiary hearing "presided over by an impartial decision maker(s)," preceded by discovery, and affording him the opportunity to call, examine and cross-examine witnesses and to present documentary evidence.

Although the Arizona Supreme Court allowed Petitioner to submit by affidavit or offer of proof any factual material he deemed relevant, Petitioner refused to submit such information. See Matter of Ronwin, 136 Ariz. 566 at 575, 667 P.2d 1281 at 1290 (1983).

After the Arizona Supreme Court denied his application for admission, Petitioner filed a Petition for a Writ of Mandamus with this Court, alleging that the state court refused to "obey the due process clause of the Fifth and Fourteenth Amendments; the District Court's decisions; and its own rules and decisions

which require that Bar applicants be accorded an opportunity for hearing with due process safeguards before final determination of their applications for admissions to practice law." Petition at 4, In re Ronwin, 465 U.S. 1004 (1984). Petitioner argued that Rule 28(c)XII.F "clearly makes the hearing requirement discretionary with the Arizona Court. Such written rules are in conflict with this Court's holdings. . . ." Id. at 7. This Court refused to issue the writ. In re Ronwin, supra.

On January 20, 1984, Petitioner filed this action in the United States District Court in further challenge to the Arizona Supreme Court's denial of his "Request." Petitioner again alleged that the Respondents, as members of the Arizona Supreme Court, violated the Fifth and Fourteenth Amendments, the Civil Rights Act and the prior rulings of this Court in

their interpretation and application of the Rules of the Arizona Supreme Court.

On June 7, 1984, the District Court granted summary judgment for the Respondents. The Court of Appeals affirmed the entry of judgment in favor of Respondents. Petitioner's request for a Writ of Certiorari followed.

ARGUMENT

A. Rule 28(c)XII Is Constitutionally Valid On Its Face.

Rule 28(c)XII.C requires the Arizona Supreme Court's Committee on Character and Fitness, if it is unable to recommend an applicant for admission, to "hold such hearing or hearings as may be reasonably required to enable the Committee to pass upon the applicant's qualifications." Further, the Rules of the Arizona Supreme Court include provisions pertinent to the conduct of those formal hearings. Rule 28(c)XII.E. In connection with such proceedings, the applicant has the right

to subpoena and take the depositions of any witnesses. Rule 28(c)XII.D. Arizona courts have interpreted these provisions to include implicitly the right of the applicant to cross-examine adverse witnesses and to present evidence at the hearing. See Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964). Once the hearing concludes, the Committee must find the facts separately from its decision. Rule 28(c)XII.E.2.

An applicant who is aggrieved by the Committee's decision may file a verified petition with the Arizona Supreme Court to obtain review of the Committee's action. Rule 28(c)XII.F. The Court is required to "hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision." Ultimately, the Arizona Supreme Court has "the duty of resolving those questions, one way or the other, on

the basis of the competent evidence before [it]." Application of Burke, 87 Ariz. 336, 339, 351 P.2d 169, 171 (1960).

This procedure for Arizona State Bar admission, which leaves the holding of further hearings to the discretion of the Arizona Supreme Court, is consistent with this Court's interpretation of the Due Process Clause. In Morrissey v. Brewer, 408 U.S. 471, 481 (1972), this Court stated:

> Due process is flexible and calls for such procedural protections as the particular situation demands.

Petitioner argues that this Court's ruling in Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) makes evidentiary hearings, including confrontation and cross-examination, mandatory in any contested bar admission proceeding. The holding of Willner is not that broad. The principle stated in Willner is simply that

> [p]rocedural due process often

> requires confrontation and cross-examination of those whose word deprives a person of his livelihood.

Id. at 103, (emphasis added). See Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

In Willner, this Court determined that the petitioner was denied procedural due process because the state court, in rejecting Mr. Willner's application, apparently relied on ex parte statements by unidentified persons, the substance of which was not disclosed to Mr. Willner and to which he was given no opportunity to respond. Because the denial by the court possibly was based on information from persons whose veracity and credibility could be questioned by the applicant, the right of confrontation and cross-examination applied.[2] See also Greene v.

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[2] Three years prior to the Willner decision, the Arizona Supreme Court also (footnote continued)

McElroy, 360 U.S. 474, 492 (1959); Goldberg v. Kelly, 397 U.S. 254, 269-71 (1970). This Court, however, did not hold that evidentiary hearings are mandatory for all admission applications, regardless of the basis for denial of admission or the amount of procedural protection accorded.

If the Arizona Supreme Court decides that additional hearings are not necessary, the court considers only the evidence contained in the record of the Committee hearings. In those Committee proceedings, the applicant had the full opportunity to exercise his right to confront and cross-examine witnesses. The rules adopted by the Arizona Supreme Court

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(footnote continued from previous page)

held that secret accusations could not be used to deny admission to the State Bar. Application of Burke, 87 Ariz. 336, 351 P.2d 169 (1960).

fully comply with the Due Process Clause.

B. The Respondents' Application of Rule 28(c)XII Did Not Deny Petitioner Due Process of Law.

After Petitioner applied to take the July 1974 bar examination, the Arizona Supreme Court's Committee on Examinations and Admissions informed Petitioner that the Committee had been unable to find him "mentally and physically able to engage in active and continuous practice of law" as required by Rule 28(c)IV.3 and, therefore, would not grant him permission to sit for the July 1974 examination.

In September 1974, the Arizona Supreme Court formed its Special Committee on Examinations and Admissions ("Special Committee") to conduct a formal hearing pursuant to Rule 28(c)XII.D to determine whether Petitioner was mentally able to engage in the active and continuous practice of law. Petitioner, represented by counsel, participated in the extensive

two-day evidentiary proceeding, which included the testimony of 20 witnesses and the admission of numerous exhibits, and received the opportunity to confront and cross-examine all witnesses.

After reviewing the transcript of the hearings, the Arizona Supreme Court agreed that Petitioner was not mentally able to engage in the active and continuous practice of law. See Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907 (1977). Specifically, the Court stated:

> He appears mentally unable to reasonably deal with the type of social interaction involved in dealing with clients, other members of the Bar and the public.

Id. at 359, 555 P.2d at 317.

Petitioner received a hearing and a review of the Committee's findings by the Arizona Supreme Court. Yet, Petitioner urges that, even in light of the initial hearing and subsequent events of record,

the Arizona Supreme Court must convene a subsequent hearing each time Petitioner applies for admission to the state bar. Neither the subsequent events involving Petitioner nor the Due Process Clause supports such a conclusion.

In response to Petitioner's sixth application for admission, the Arizona Supreme Court ordered in 1977 that all applications of the Petitioner be forwarded directly to it, because the members of the Committee on Character and Fitness were defendants in pending litigation with the Petitioner. The Court subsequently denied Petitioner admission because he had failed to show any substantial change in his mental condition. The Court, however, did not hold that Petitioner would never be entitled to another hearing. Instead, the court required only that Petitioner, to obtain another evidentiary hearing, first

establish that a substantial change in his mental condition has occurred. Specifically, Petitioner must show that he no longer possesses

> [l]ong-standing personality traits [which] indicate an obvious inability to get along with authority figures under situations of minor stress and conflict, whether or not these personality deficiencies rise to the level of medically recognized and categorized mental disorders.

Id. at 359, 555 P.2d at 317 (emphasis added).

The long-standing personality traits evidenced by Petitioner and recognized by the court in 1976, still existed in 1983 when the Arizona Supreme Court denied Petitioner's eighth and ninth applications for admission to the State Bar of Arizona. Matter of Ronwin, 136 Ariz. 566, 667 P.2d 1281 (1983). In that decision, the court noted:

> Ronwin's transgressions exceed occasional anger or loss of control. They form a pattern and a way of life which, on this record, appears to be

> applicant's normal reaction to personal or professional adversity.

Id. at 573-74, 667 P.2d at 1288-89. Given the court's repeated findings of unacceptable long-term behavior, the Arizona Supreme Court's requirement that Petitioner initially show that his condition has substantially changed is certainly reasonable.

This approach by the Arizona court is consistent with the accepted practice of other states, which also impose upon an applicant the burden of establishing that he is of "good moral character" or "mentally able to practice law." In addition, once an applicant or practicing attorney has been found deficient in those qualities that a state requires of its practitioners, the burden is upon that person to show a change in his condition. See Matter of Braverman, 549 F.2d 913 (4th Cir. 1976); In re Alker, 307 F.2d 880 (3rd Cir.), cert. denied, 371 U.S. 923 (1962);

Levenson v. Mills, 294 F.2d 397 (1st Cir. 1961), cert. denied, 368 U.S. 954 (1962).

The principles of due process do not dictate, and practical considerations make impossible, convening multiple hearings to revisit matters previously heard and considered by the Arizona Supreme Court. This Court has, in fact, recognized the state courts' freedom to gauge an applicant's fitness to practice law on a case-by-case basis. See In re Griffiths, 413 U.S. 717 (1973). This individualized approach to applicant review is consistent with the general rule that

> [n]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. [Citations omitted.] "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Mitchell v. W. T. Grant Co., 416 U.S. 600, 610 (1974).

Kremer v. Chemical Construction Corp., 456 U.S. 461, 483 (1982).

The Arizona Supreme Court has

accepted from Petitioner and considered ten applications for state bar admission. Petitioner has been given numerous opportunities to provide prima facie evidence of a change in his mental ability to practice law. Petitioner cannot or will not bear the burden of making such a showing. Until he does so, the principles of due process do not require additional evidentiary hearings.

C. This Action is Barred by the Doctrine of Res Judicata.

Through this action, Petitioner seeks a declaration that Rule 28 is unconstitutional, on its face and as applied. Repeatedly, and unsuccessfully, Petitioner raised the same claim in previous state and federal actions. In Matter of Ronwin, 136 Ariz 566, 667 P.2d 1281, cert. denied sub nom. Ronwin v. Supreme Court of Arizona, 464 U.S. 977 (1983), Petitioner demanded an evidentiary hearing in connection with his eighth and

ninth applications for admission to the State Bar of Arizona. The Arizona Supreme Court considered that request and discussed in detail its reasons for determining that an evidentiary hearing was unnecessary and inappropriate. Id. at 574-75, 667 P.2d at 1289-90.

In connection with his tenth application for admission to the State Bar, Petitioner again demanded an evidentiary hearing, the denial of which provides the basis for this action. Although Petitioner's pleadings before the Arizona Supreme Court are less than a model of clarity, Petitioner apparently attempted to challenge the constitutionality of Rule 28(c)XII in those proceedings. Even if he did not specifically raise the issue of Rule 28(c)XII's constitutionality before the state court, Petitioner clearly could have done so. Because that opportunity was available to Petitioner, any failure

to challenge the validity of Rule 28(c)XII before the state court barred him from raising that issue in later proceedings. See Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

When the state court rejected Petitioner's argument, he petitioned this Court for a Writ of Mandamus, arguing that subsection F of Rule 28(c)XII "clearly makes the hearing requirement discretionary with the Arizona Supreme Court. Such written rules are in conflict with this Court's holdings. . . ." Id. at 7. This Court refused to issue the writ. In re Ronwin, 465 U.S. 1004 (1984).

Petitioner also either unsuccessfully challenged, or failed to question the validity of, Rule 28(c)XII in several other federal actions. See Ronwin v. Supreme Court of Arizona, 439 U.S. 828 (1978); Ronwin v. Segal, 634 F.2d 636 (9th Cir. 1980), cert. denied, 450 U.S. 1041

(1981); Ronwin v. Gage, 78-214 PHX MLR (D. Ariz. 1979); Ronwin v. von Ammon, No. CIV 79-175 PHX WEC (D. Ariz. 1980), aff'd mem., 688 F.2d 848 (9th Cir. 1982); Ronwin v. von Ammon, No. CIV 80-289 PHX CAM (D. Ariz. 1980), aff'd mem., 688 F.2d 848 (9th Cir. 1982); Ronwin v. Holohan, No. CIV 83-1036 PHX CLH (D. Ariz. 1983), aff'd mem., No. 83-2676 (9th Cir., March 7, 1985). In each of these cases, Petitioner unsuccessfully argued that the language or application of Rule 28(c)XII was unconstitutional, and/or that an evidentiary hearing should be held.

Because the issue of the constitutionality of Rule 28(c)XII has been determined or, alternatively, Petitioner has foregone prior opportunities to challenge its validity,

> [p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be

> considered forever settled as between the parties.

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931).

The prior resolution of Petitioner's due process challenge by the state court, which has unquestioned authority to decide federal constitutional questions, provides further reason for applying the doctrine of res judicata:

> When a state court has adjudicated a claim or issue, these doctrines [res judicata and collateral estoppel] also serve to "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." Id. at 96.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 468, n.6 (1982).

CONCLUSION

The decision of the Ninth Circuit Court of Appeals was consistent with the decisions of this Court and the due process requirements of the Fourteenth Amendment. This action is also barred by the doctrine of res judicata. The

Petition for Writ of Certiorari should be denied.

Respectfully submitted.

FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS

By Philip E. von Ammon

Philip E. von Ammon
1700 First Interstate
Bank Building
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for Respondents

July 3, 1986

APPENDIX

RULES 28(a), 28(c)IV.3, 28(c)XII.C, 28(c)XII.D, 28(c)XII.E and 28(c)XII.F, RULES OF THE ARIZONA SUPREME COURT

Rule 28. Examination and Admission

28(a)[1] **Committees on examinations and admissions; powers and duties.** The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purposes two committees shall be constituted. One Committee shall be the Committee on Examinations. The other Committee shall be the Committee on Character and Fitness. Each Committee shall consist of seven active members of the State Bar appointed by the Court upon the recommendation of the Board of Governors of the State Bar which shall recommend at least three members of the State Bar for each appointment to be made. Members of the two Committees

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[1]Rule 28(a) is now Rule 33(a).

shall serve for seven year terms. In the case of the Committee on Character and Fitness now being separately established the seven initial appointments shall be for terms of seven, six, five, four, three, two and one year respectively. Thereafter, upon the expiration of a member's term, the Court shall appoint a new member to serve for a term of seven years. As to each Committee, in the event of a resignation or inability of a committee member to serve, the Court shall appoint another person to serve the unexpired term. The Committee on Examinations shall examine applicants and advise this Court and the Committee on Character and Fitness of those who have passed the examination or examinations required for admission to the State Bar of Arizona. The Committee on Character and Fitness shall recommend to this Court for admission to the State Bar of Arizona

those individuals who, having passed the examination or examinations required for admission to the State Bar of Arizona, are deemed by the Committee to be qualified on the basis of character and fitness. The Court will then consider the recommendations and either grant or deny admission.

28(c) Rules governing admission of applicants to the State Bar of Arizona, as amended.

IV. APPLICANT REQUIREMENTS AND QUALIFICATIONS[2]

On the basis of a properly completed application timely filed the applicant will be entitled to sit for the bar examination.

No applicant for admission to the State Bar of Arizona shall be recommended for admission by the Committee on Character and Fitness unless the

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[2]Rule 28(c)IV is now Rule 34(c).

Committee is satisfied:

* * *

3. That he is mentally and physically able to engage in active and continuous practice of law.

XII.[3] RULES GOVERNING PROCEDURE BEFORE THE COMMITTEES

C. Formal Hearings on Character and Fitness. If the Committee on Character and Fitness is unable to make the findings required to support a recommendation for the applicant's admission with respect to character and fitness, the Committee shall hold such hearing or hearings as may be reasonably required to enable the Committee to pass upon the applicant's qualifications. Notice of such hearing or hearings shall be given to the applicant as to the subject and purpose of the hearing.

After the hearing or hearings the

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[3]Rule 28(c)XII is now Rule 36.

Committee on Character and Fitness shall report to the Court its findings that the applicant meets the character and fitness requirements and should be admitted or that the Committee is unable to make such findings and recommendation, as the case may be. The applicant shall at the same time be informed of the Committee's recommendation.

D. Formal Hearings, Subpoena and Depositions. Upon the issuance of the Notice of Hearing hereinbefore provided for, the proceeding thenceforth shall be and is considered a civil matter pending before this Court referred to the Committee on Examinations or the Committee on Character and Fitness for hearings, findings and decision as to the right of such applicant to be admitted to the bar examination applied for.

* * *

Thereafter, all of the Rules of Civil Procedure authorizing, relating to and governing depositions in civil proceedings within and outside the state shall become applicable and shall authorize and govern depositions desired either by applicant or by the Committee on Character and Fitness in connection with said hearing.

Either the Committee on Character and Fitness or the applicant shall be entitled to have subpoenas (including duces tecum) issued by the Clerk of this Court to require the attendance of witnesses at said hearing and any continuance thereof. The party desiring issuance of such subpoena shall file the application therefor with any Justice of this Court with a brief statement of the reasons for requiring such subpoena accompanied by a form of order authorizing the Clerk of this Court to

issue such subpoena and the form thereof for issuance by the Clerk.

In the event the Committee on Character and Fitness by vote of a majority of its members finds that the proposed hearing will be complex, or for other reasons deemed sufficient, the Committee may certify to this Court that in its opinion an examiner should be appointed from State Bar members to further investigate and present the evidence bearing upon the issue of the applicant's qualifications to be admitted to the examination applied for, and upon receipt thereof the Chief Justice of this Court, provided he approves the need thereof, shall appoint such an examiner to further investigate said matter and to present all available evidence upon the hearing aforesaid; provided, however, that the foregoing provision shall not be deemed or construed as denying to the

applicant the right to be represented by counsel of the applicant's choosing who may represent applicant fully and independently of the duties and responsibilities of such examiner.

E. Conduct of Hearings.

1. One or more members of the Committee on Character and Fitness shall conduct the hearing, one of whom shall be designated by the chairman as the presiding member, who shall announce all rulings of the Committee which shall be made without a vote of the members unless the applicant shall request a ruling upon any matter by a majority of the members in attendance at the hearing. In the event the entire membership of the Committee shall not be present and participate in all hearings no final decision shall be deliberated or reached by the Committee until a transcript of all hearings shall be available to all

members for review of the testimony and evidence received when any member was absent.

2. After the hearing and any continuance thereof are concluded, the Committee on Character and Fitness shall promptly convene as soon as the transcript thereof is available, and reach and announce their findings and decision as to the right of such applicant to be admitted to the examination applied for. The Committee shall find the facts separately from its decision.

F. Review by the Supreme Court.

1. An applicant aggrieved by any decision of the Committee on Examinations or the Committee on Character and Fitness may within 20 days after such occurrence file a verified petition with this Court for a review. The petition shall succinctly and briefly state the facts

which form the basis for the complaint, and applicant's reasons for believing this Court should review the decision of the Committee on Examinations or the Committee on Character and Fitness.

2. A copy of said petition shall be promptly served upon the chairman or some member of the Committee from which the complaint arose and that Committee shall within 15 days of such service transmit said applicant's file and a response to the petition fully advising this Court as to that Committee's reasons for its decision and admitting or contesting any assertions made by applicant in said petition. Thereupon this Court shall consider the papers so filed together with the petition and response and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and

obligations of applicant judged in the light of that Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law.